ORIGINAL

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of	)	
	)	
Implementation of the	)	
Telecommunications Act of 1996:	)	CC Docket No. 96-115
	)	
Telecommunications Carriers' Use	)	
of Customer Proprietary Network	)	
Information and Other	)	
Customer Information	)	
	)	

FURTHER REPLY COMMENTS OF MCI TELECOMMUNICATIONS CORPORATION

MCI TELECOMMUNICATIONS CORPORATION

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Dated: March 27, 1997

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SUMMARY

The further comments submitted in response to the Bureau's Public Notice confirm MCI's worst fears that AT&T and the BOCs intend to exploit their monopoly-derived CPNI advantages while denying competitors nondiscriminatory access to such CPNI. AT&T and the BOCs continue to misread Section 222 in ways that would eviscerate it, and the BOCs compound those errors by refusing to recognize the interrelationship of Section 222 to Section 272(c)(1) and other provisions of the Communications Act.

MCI has previously explained in its Further Comments why a notice and opt-out procedure cannot constitute the approval required under Section 222(c)(1) and why all telecommunications services cannot be lumped together and treated as the same "service" in applying the restrictions in Section 222. MCI has also explained that, with customer approval, CPNI may be disclosed to anyone under Section 222(c)(1), including unaffiliated entities. The BOCs' contrary views on these issues -- particularly their nonstatutory insistence that a more stringent approval process is necessary for a carrier's disclosure of CPNI to unaffiliated entities than for the use of CPNI by the carrier or disclosure to an affiliate -- prevent them from properly analyzing the relationship of Section 222 to other provisions of the Act.

For example, some of the BOCs pay lip service to the nondiscrimination requirement of Section 272(c)(1) by stating that it requires a BOC to disclose CPNI on a nondiscriminatory basis, whether to an affiliate or any other entity, where there

is a lawful approval, but they then argue that Section 222 requires a different lawful approval for intracorporate disclosure from the approval required for disclosure to all others. As MCI has explained, however, Section 222(c)(1) applies equally to any "use" or "disclosure;" the identity of the user or recipient is irrelevant. Accordingly, Section 272(c)(1) requires that a BOC disclose CPNI to any entity that can show the same type of approval that the BOC relies upon to disclose CPNI to its affiliates. In both cases, explicit, oral approval constitutes the approval required by Section 222(c)(1).

Some of the BOCs argue that since Section 272(c)(1) does not specifically mention CPNI, and since Section 222 is so exhaustive, no provision other than Section 222 applies in any way to CPNI practices. Nothing in the language or history of Section 222 suggests, however, that it immunizes CPNI practices from the application of any other provision in the Communications Act, and it is perfectly consistent with Section 272(c)(1) and other nondiscrimination provisions. Moreover, all carriers have to follow nondiscrimination principles in their handling of CPNI, since Sections 201(b) and 202(a) also apply to such practices. Finally, the Section 272(g)(3) exemption for joint marketing activities from the application of Section 272(c)(1) does not apply to the use or disclosure of CPNI in connection with such joint marketing. The Section 272(g)(3) exemption does not reach everything that is useful for marketing, but only conduct that directly constitutes joint marketing. Moreover, the exemption only covers activities "permitted under" Section 272(g).

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Introduction

MCI Telecommunications Corporation (MCI), by its undersigned counsel, hereby replies to the further comments addressing certain questions relating to this proceeding raised in the Bureau's Public Notice (Notice).[1] Those questions explored the interrelationship of Sections 222, 272 and 274 of the Communications Act of 1934, as amended by the Telecommunications Act of 1996 (1996 Act).[2]

The further comments confirm MCI's worst fears that AT&T and the Bell Operating Companies (BOCs) intend to exploit their monopoly-derived caches of customer proprietary network information (CPNI) while denying competitors reasonable access to such CPNI. It is therefore imperative that the Commission promulgate stringent CPNI rules that advance both the competitive

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[1] DA 97-385 (released Feb. 20, 1997).

[2] Pub. L. No. 104-104, 110 Stat. 56 (1996), codified at 47 U.S.C. §§ 151 et seq.

and privacy goals of Section 222 of the Act. Otherwise, AT&T and the BOCs will be able to use their unearned CPNI advantages to short-circuit the development of the competition intended by the 1996 Act.

MCI reviewed in its Further Comments recent filings in this docket by AT&T and the BOCs demonstrating how they would eviscerate Section 222 through a "notice and opt-out" customer "approval" procedure under Section 222(c)(1), by treatment of all telecommunications services as falling within a single "bucket," and by imposing more stringent approval requirements on the disclosure of CPNI to unaffiliated entities than on disclosure to BOC affiliates. In their further comments, the BOCs have now taken their analyses one step further by asserting that Section 272(c)(1) and (e) and other nondiscrimination provisions in the Communications Act can have no effect on CPNI practices. They claim that Section 222, because it covers every aspect of CPNI, exempts CPNI activities from other requirements of the Act. The combination of their misreading of Section 222 and their refusal to acknowledge the relationship of Section 222 to other provisions of the Act results in wrong answers to almost every question in the Notice.

A. AT&T and the BOCs Continue to Misread Section 222

AT&T and the BOCs devote considerable attention in their further comments to Section 222 interpretation issues they addressed in previous filings. MCI has already responded to

these points in its Further Comments and will not do so in detail here. The primary significance of those issues in this round of comments is that AT&T and the BOCs misread Section 222 to such an extent that it would be almost impossible for them to provide any useful analyses of the interrelationship of Section 222 with other provisions of the Act, even if they properly construed the other provisions -- which they do not.

Thus, they argue that Section 222 is primarily a privacy measure intended to protect CPNI from disclosure to third parties and that subsection (c)(2) is the only provision with a competitive goal.[3] Accordingly, they assert that a notice and opt-out procedure is sufficient to constitute customer approval under Section 222(c)(1) for use of CPNI by a carrier or disclosure to its affiliate, while some more stringent method, such as written authorization, is always necessary for disclosure to unaffiliated entities.[4] Related to that theory is their continued misreading of the relationship of Section 222(c)(1) and 222(c)(2). They claim that the former is intended only to allow use or disclosure within a carrier's corporate family, while the latter is necessary for disclosure to third parties.[5] The BOCs attempt to justify these approaches in their further comments by

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[3] See, e.g., Pacific Telesis Further Comments at 4.

[4] See, e.g., AT&T Further Comments at 8-9; Pacific Telesis Further Comments at 5.

[5] See, e.g., AT&T Further Comments at 8-9; Bell Atlantic/NYNEX Further Comments at 6; SBC Communications Further Comments at 5-6.

arguing that they are consistent with customers' privacy expectations.[6] As an alternative, AT&T and some of the BOCs continue to press their "single bucket" approach to the categorization of services for purposes of Section 222(c),[7] which would do away with that provision altogether.

MCI has already explained why these approaches are contrary to the intent and language of Section 222, especially given Congress' goal of restraining the BOCs' use of CPNI already in their possession in order to facilitate the development of competition. The restrictions in Section 222(c) must therefore be applied between affiliates and on an intracorporate basis to the same extent as between unaffiliated entities. In both cases, "approval" under Section 222(c)(1) must be a knowing, explicit oral approval.[8] Otherwise, customers will not have the control over their CPNI that the BOCs acknowledge Section 222 was intended to provide.[9] Moreover, Section 222(c)(1) allows the "use" or "disclosure" of CPNI with the customer's approval; there are no restrictions in that subsection on the entity to which such approved disclosure may be made.[10] Indeed, some of the BOCs concede that written authorization is not always necessary for

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[6] See, e.g., BellSouth Further Comments at 10-13; Bell Atlantic/NYNEX Further Comments at 1-4.

[7] See AT&T Further Comments at 2-4.

[8] MCI Further Comments at 4-10.

[9] See, e.g., Pacific Telesis Further Comments at 2.

[10] See MCI Further Comments at 9-10.

disclosure of CPNI to third parties, since a change in local service carrier "is implicit authorization to disclose to the new carrier the CPNI needed to effect the change," as Bell Atlantic/NYNEX correctly states.[11]

B. The BOCs Fail to Recognize Fully the Relationship of Section 222 to Other Provisions in the Act

The BOCs compound these errors by refusing to recognize the applicability of Section 272 and other provisions of the Act to CPNI practices. They give lip service to the nondiscrimination requirement in Section 272(c)(1) by saying that CPNI must be provided to all entities on the same terms and conditions, such as the rate charged per customer,[12] but they avoid applying that principle to the most important condition of all -- namely, the approval procedure required for disclosure. This studious avoidance of the obvious leads to tortuous circumlocutions, as when Pacific Telesis states that Section 272(c)(1) requires a BOC to disclose CPNI to an affiliate or any other entity on a nondiscriminatory basis where the recipient can demonstrate a "lawful approval," but then goes on to assert that Section 222 requires a different lawful approval for intracorporate disclosure from the lawful approval required for disclosure to all others. They claim that any "discrimination" is therefore

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[11] Bell Atlantic/NYNEX Further Comments at 2 n.3. See also, US West Further Comments at 7 n.14.

[12] See, e.g., US West Further Comments at 20.

required by Section 222.[13] Thus, the BOCs' views of the relationship of Section 272(c)(1) to Section 222 are distorted by their misreading of Section 222 itself.

As explained above, Section 222(c)(1) allows use of CPNI by a carrier or disclosure of CPNI to affiliates or unaffiliated entities upon customer approval. There is nothing in Section 222 that suggests that use or disclosure under Section 222(c)(1) must be based on different types of customer approval, depending on the identity of the user or recipient of such disclosure. Thus, Section 272(c)(1) requires that, where Section 222 allows but does not require disclosure -- i.e., where there is customer approval under Section 222(c)(1) or one of the exceptions under Section 222(d) applies -- a BOC must disclose CPNI to unaffiliated entities under the same conditions pursuant to which it uses CPNI or discloses CPNI to its affiliates. That can only mean that a BOC must disclose CPNI to any other entity demonstrating the same type of customer approval under Section 222(c)(1) that the BOC obtains from customers for its own use of CPNI or disclosure of CPNI to its affiliates.

In other words, the nondiscrimination requirement of Section 272(c)(1) converts the permissive disclosure of CPNI allowed by Section 222(c)(1) into a mandatory disclosure if the BOC uses CPNI or discloses it to its affiliate pursuant to an approval under Section 222(c)(1) and an unaffiliated entity demonstrates

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[13] Pacific Telesis Further Comments at 6, 9. See also, Ameritech Further Comments at 8-10.

that a customer has given the same type of approval for disclosure of CPNI to that entity.[14] If, as MCI has argued, explicit oral approval is necessary for disclosure under Section 222(c)(1), that should be the form of approval for both affiliated and unaffiliated entities. If, on the other hand, the Commission were to determine that notice and opt-out approval is sufficient to demonstrate approval under Section 222(c)(1), a BOC could not use that form of approval to justify its own use of CPNI or disclosure of CPNI to its affiliate while requiring a more stringent form of approval for disclosure to others.[15]

One straw man raised by the BOCs with regard to the effect of Section 272(c)(1) on BOC CPNI practices is the claim that imposing such a nondiscrimination requirement on CPNI disclosure would upset customers' privacy expectations or somehow take the decision as to whether or not to disclose CPNI out of the consumer's hands.[16] Nondiscrimination does not override the protections in Section 222, however; rather, it supplements them by requiring that the same customer approval process be used for disclosure to unaffiliated entities as is used for disclosure to a BOC's affiliate. If a valid approval is obtained for both

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[14] See AT&T Further Comments at 10-11.

[15] Even Pacific Telesis, at pages 10-11 of its Further Comments, concedes that if the same form of approval is "lawful" for CPNI disclosure to both affiliates and unaffiliated entities, a BOC would have to follow the same approval and disclosure procedure for both.

[16] See, e.g., BellSouth Further Comments at 4; Pacific Telesis Further Comments at 3, 7-8.

under Section 222(c)(1), customers' privacy expectations will be protected.

Some of the BOCs argue that the nondiscrimination requirements in Section 272 and other provisions should be read narrowly, given how much CPNI some other nationwide carriers possess compared with the regionally restricted BOCs.[17] Only AT&T has CPNI for more customers than some BOCs, however, which explains why its views in this proceeding parallel the BOCs' positions to such a large extent. Moreover, as Worldcom points out, the BOCs' CPNI is more "ubiquitous and all-inclusive" within their service areas than any other carriers' CPNI. By providing local exchange service, they derive not only CPNI about all of their subscribers' local services, but also CPNI about their interLATA and intraLATA toll services.[18] Any rules that provide carriers virtually automatic access to their CPNI while obstructing third parties' access to such CPNI are going to favor the BOCs and AT&T unduly, as well as violating Section 222.

One set of questions that elicited revealing responses as to the effect of Section 272(c)(1) on Section 222 were those dealing with the issue of whether a BOC's affiliate should be treated as an unrelated entity for purposes of Section 222 (see Questions 2 and 3). The BOCs took the opportunity provided by these questions to repeat their arguments that since a more stringent

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[17] See, e.g., Pacific Telesis Further Comments at 4; US West Further Comments at 4.

[18] See Worldcom Further Comments at 2.

approval procedure is appropriate for disclosure of CPNI to unaffiliated entities than is appropriate for intracorporate disclosure, there is no need to treat a BOC affiliate as a third party in applying Section 222.[19]

As MCI pointed out in its Further Comments, the issue is not whether the entity seeking access to CPNI is an affiliate or an unrelated entity, but, rather, whether the CPNI is sought for a purpose unrelated to the service category from which the CPNI was derived. If so, customer approval under Section 222(c)(1) is necessary in order to allow the use of such CPNI by the carrier or its disclosure to an affiliate or an unaffiliated entity. The restrictions of Section 222(c) are applied between service categories, not just between corporate entities. The nondiscrimination requirement of Section 272(c)(1) comes into play when disclosure of CPNI to a BOC affiliate has taken place. Section 272(c)(1) then requires that CPNI must be disclosed to any other entity making the same showing of customer approval.

Since the restrictions of Section 222(c) are applied between service categories, the approach suggested by MCI results in the even-handedness the BOCs say they want. For example, Ameritech is correct in arguing that the requirements applicable to the BOCs' use of their local service CPNI for joint marketing on behalf of their interLATA affiliates should be no greater than those applicable to IXCs' use of their interLATA CPNI in

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[19] See, e.g., BellSouth Further Comments at 13-16.

marketing local services.[20] Where Ameritech goes wrong is in arguing that both may use notice and opt-out approval processes. Rather, both may use CPNI with explicit, knowing oral approvals by their customers under Section 222(c)(1).

Some of the BOCs attempt to free themselves of any nondisclosure requirements with respect to CPNI by arguing that there is no connection or interrelationship between Section 222 and Section 272(c)(1) or any other provision in the Communications Act.[21] They point out that Section 272(c)(1) does not mention CPNI and claim that Section 222 is so all-encompassing that, applying such principles of statutory construction as "the specific overrides the general," there is no room for the application of any other requirement in the Communications Act to the use or disclosure of CPNI.[22] They also raise a related complaint that an undue emphasis on Section 272 and 274 will create more stringent CPNI rules for BOCs than for other carriers, whereas Section 222 was intended to apply equally to all carriers.[23]

There is nothing in the language or legislative history of Section 222, however, to suggest that it immunizes CPNI practices from any other legal principles or was intended to be the

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[20] Ameritech Further Comments at 5-7.

[21] SBC Communications Further Comments at 1.

[22] See Ameritech Further Comments at 8-12; BellSouth Further Comments at 2 n.5.

[23] See Ameritech Further Comments at 1-3.

exclusive legal principle governing anything relating to CPNI practices. Where Congress intended to exempt particular activities from nondiscrimination rules, such as in Section 272(g)(3), it did so explicitly. The absence of any such exemption in Section 222 confirms that no such immunization was intended.[24] Moreover, there is no conflict between Section 222 and other provisions requiring resort to any other rules of construction. As MCI has explained, Section 222, properly read, dovetails perfectly with Section 272(c)(1) and other provisions of the Act to create a coherent, internally consistent scheme. It is AT&T's and the BOCs' interpretations of Section 222 that create loose ends when they attempt to construe that provision with the rest of the Act.

Moreover, as MCI explained in its Further Comments, carriers' CPNI practices are also governed by Sections 201(b) and 202(a) of the Act, which apply to all carriers, not just the BOCs.[25] Thus, all carriers must apply the same approval criteria to unaffiliated entities as they do with regard to their own use of CPNI. The Telecommunications Resellers' Association (TRA) argues that Section 202(a) does not apply to CPNI practices because the provision of CPNI is not a common carrier service.[26]

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[24] See League to Save Lake Tahoe, Inc. v. Trounday, 598 F.2d 1164, 1171 (9th Cir. 1979)(where there is an explicit exclusion in one provision of a statute but not in another provision of the same statute, it should be assumed that Congress intended to omit the exclusion in the latter).

[25] See MCI Further Comments at 12-15.

[26] See TRA Further Comments at 9.

If a carrier applies different CPNI disclosure standards to affiliated and unaffiliated entities competing in the provision of "like" services, however, it is discriminating in "practices [or] classifications ... in connection with like communication service" and is "mak[ing] or giv[ing]" an "undue or unreasonable preference or advantage" to a "person," as prohibited by Section 202(a). Moreover, a BOC or incumbent LEC engaging in such practices is also exploiting its monopoly-derived advantage in CPNI in order to gain an advantage in a competitive market, in violation of Section 201(b) of the Act.[27]

The application of Sections 201(b) and 202(a) to carriers' CPNI practices will be even more crucial than MCI had previously realized, since the BOCs state openly in their further comments that a "BOC can discriminate in favor of its Section 272 affiliate" in its CPNI disclosure practices in any situation where Section 272(c)(1) might not be applicable.[28] The Commission needs to disabuse them of this notion by prohibiting any discrimination by any carrier or favoritism toward its affiliates in the use or disclosure of CPNI or the customer approval accepted or required by the carrier for such use or disclosure.

One area where the BOCs claim that Section 272(c)(1) is inapplicable to CPNI disclosure practices is in connection with

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[27] See MCI Further Comments at 12-13.

[28] SBC Communications Further Comments at 12. See also, Pacific Telesis Further Comments at 19-20.

joint marketing under Section 272(g). In their responses to Question 7, the BOCs state that the exemption in Section 272(g)(3) from the nondiscrimination requirement in Section 272(c)(1) for joint marketing activities includes CPNI use or disclosure related to such activities. They argue that since CPNI is essential for marketing, any exemption for joint marketing must cover CPNI practices in connection with such marketing.[29] They claim that without such CPNI, the permission granted for joint marketing in Section 272(g) would be meaningless, frustrating the purpose of the exemption in Section 272(g)(3).[30]

As MCI explained in its Further Comments, however, the BOCs cannot escape the requirements of Sections 201(b) and 202(a) in any event, whatever the coverage of Section 272(c)(1) might be. Moreover, as MCI and a number of parties explained, the exemption in Section 272(g)(3) does not extend to every activity or aspect of the BOC's operations that might be useful for joint marketing. Otherwise, the exemption would swallow up the entire range of BOC operations. The use or disclosure of CPNI or the obtaining of customer approval for such use or disclosure do not constitute marketing or selling telecommunications services. CPNI practices are no more exempted from Section 272(c)(1) than is the provision of the services being jointly marketed.[31]

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[29] See, e.g., Pacific Telesis Further Comments at 14-15.

[30] Ameritech Further Comments at 3-4.

[31] See AT&T Further Comments at 13-16 & n.17.

Finally, the exemption in Section 272(g)(3) only extends to the "joint marketing and sale of services permitted under this subsection [272(g)]." The use or disclosure of CPNI and the soliciting of approvals therefor are not activities "permitted under" Section 272(g). Since CPNI practices, unlike BOC joint marketing, are not activities that are permitted only by virtue of Section 272(g), they are not covered by the exemption in Section 272(g)(3).

Conclusion

For the reasons stated herein and in MCI's previous filings in this docket, MCI submits that the Commission should promulgate rules implementing Section 222 of the Act that carry out the competitive purposes of that provision and that ensure nondiscriminatory access to CPNI by all competitors.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I, Sylvia Chukwuocha, do hereby certify that a true copy of the foregoing "FURTHER REPLY COMMENTS OF MCI TELECOMMUNICATIONS CORPORATION" was served this 27th day of March, 1997 by hand delivery or first class mail, postage prepaid, upon each of the following parties:

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